Expansion of Non-conforming use

Wed 4/22/2015 8:03 AM

Good morning,

A building inspector denies a building permit for the addition of a porch in the front setback. Owner appeals the administrative decision. Come to find out the house is pre-existing non-conforming since it was built before the town was incorporated so definitely predates zoning.

Can the building inspector use the four prong New London tests to determine whether or not the expansion is okay?

If not, and the ZBA have to do it, can they do it at the hearing on the administrative decision appeal or do the owners have to apply for a variance and have the ZBA say, you don't need one because you can expand the nonconforming structure?

Say the administrative decision appeal was already held and the building inspector's decision was affirmed. How do the owners get back to the ZBA for their relief?

Thank you,

Nic Strong
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Wed 4/22/2015 10:42 AM

Hi Ms. Strong:
On the proper ***procedure,*** there's a lot here that depends on what a town's local ordinance says.

Just in terms of ***state*** law, in my view nothing prevents the 4-part *New London* test for changes/expansions of nonconforming uses from being applied, either originally by a building inspector, or later by the ZBA if someone files an administrative appeal of the building inspector's decision (*see*, for example, *Peabody v. Town of Windham*, 142 N.H. 488 (1997)). There is certainly no need for an owner to apply for a variance just to raise the nonconforming issue before the ZBA (unless of course the administrative appeal is denied, in which case the owner could then choose to apply for a variance).

However a lot depends on what the local ordinance says. Some ordinances, for example, say that the building inspector must apply the terms of the ordinance strictly and literally, in which case it is doubtful that a permit for an expansion in a nonconforming use (or structure) could be granted solely by the building inspector, without ZBA action. In fact, some ordinances state that changes and expansions of nonconforming uses (and/or structures) can only occur by special exception, in which case it clearly does require ZBA action.

In terms of your last question, if the ZBA has already upheld the zoning administrator, then the owner's potential next step – just from a procedural perspective – would be to file a motion for rehearing (RSA 677:2), or to apply for a variance (or perhaps even ask for both at once, as alternative possibilities).

I hope this helps, but clearly a lot can hinge on what your ordinance says about this.

Sincerely,

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Wednesday, April 22, 2015 11:22 AM

Bernie: I agree 100% with your conclusion that, since the ZBA upheld the denial, the remedy is to move for rehearing and apply for a variance.

However, I don't like the idea of a building inspector applying the 4-pronged supreme court analysis and deciding whether or not to apply the zoning ordinance to an expansion. In my view RSA 674:19 says that the zoning ordinance applies to expansions and a variance is required because the proposal does not comply.

If a building inspector can simply issue the permit by concluding that the expansion is 'grandfathered' – then abutters likely won't know of it until the porch is being constructed. This could result in a situation where the abutters then appeal, potentially claiming that the owner was charged with notice of the zoning ordinance, he should have known that he needed a variance. A real mess, either way.
By comparison, if the building inspector simply follows the Zoning Ordinance and denies the permit because it violates the setback, then a variance is sought and notice is given to abutters. If the variance is issued, there is little risk to the Town and everyone had an opportunity to be heard.

That's just my view.

Justin C. Richardson
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Wed 4/22/2015 12:08 PM

Hi Justin:

As a matter of policy, I do agree that – regardless of the ordinance wording - a building inspector should be extremely reluctant to allow a change/expansion of a nonconforming use, and that usually any doubt whatsoever should result in a denial, so that a hearing can then be held by the ZBA (assuming there's an appeal). On the other hand, except where the ordinance says otherwise, I don't think, solely as a matter

of state law, that a building inspector is outright legally prohibited from granting a permit for a change which he/she thinks is clearly within the 4-part test (unless the local ordinance says s/he can't). Admittedly there's not much precedent on this point – which is probably why it's a good thing to have a clause in your ordinance limiting the building inspector's discretion.

I do fairly strongly disagree that a variance should always be required. First, from the standpoint of ***statute*** – RSA 674:19 says that a zoning ordinance shall apply to a use which is "substantially different" – and I think it's reasonable to interpret that – consistent with case law - as being a change which ***doesn't*** fall within very narrow right to expand under the 4-part test. More importantly, as a matter of case law, the whole point of the development of the 4-part test (which of course the Court keeps calling the 3-part test) is that changes/expansions which meet, and are within that very limited range of change/expansion rights, are ***part of*** the owner's constitutionally-protected nonconforming use rights – rights which aren't necessarily recognized within the 5-part test for a variance, even after *Simplex.*

In terms of notice, the abutters and public get the same notice and right to be heard, regardless of whether the case is an administrative appeal or a variance. (I participated in a case a few years back where the judge required the town to pay the abutters' attorney's fees because the ZBA "should have known" that abutter/public notices were required for administrative appeals).

Of course that's just my view. Cheers!

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